Supreme Court, U.S.
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In The

Supreme Court of the United States

SAMUEL LECHUGA,

Petitioner,

v.

BRIAN PERRYMAN, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, CHICAGO DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Petitioner, a longtime legal permanent resident of the United States, is barred from eligibility for relief from deportation based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA) enacted by Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA). Petitioner challenged his final deportation order on the grounds that Congress did not authorize application of Section 440(d) to pending deportation cases and that Section 440(d) violates the equal protection guarantee of the Fifth Amendment. Based on circuit precedents holding that direct review with Court of Appeals by a petition for review had been repealed for aliens deportable on the basis of criminal convictions, petitioner brought his challenge in the habeas corpus action in federal District Court. The Seventh Circuit, in contrast to the results now reached by every other circuit, held that the district courts did not have habeas corpus jurisdiction over either the statutory or the constitutional claim and accordingly dismissed petitioner's case.

The question presented is:

1. Whether, in light of the lack of any reference to 28 U.S.C. § 2241 in the AEDPA and IIRIRA, and the requirements of the Constitution, the Court of Appeals erred in holding that petitioner was barred from challenging his deportation order in habeas corpus proceedings under Section 2241 and under the Suspension Clause?

PARTIES TO THE PROCEEDINGS

Petitioner is Samuel Lechuga.

Respondent is Brian Perryman, as Chicago District Director of the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI

Samuel Lechuga petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. 1)[1] is an unreported order; *Lechuga v. Perryman*, No. 99-2930 (7th Cir., March 1, 2000). The decision of the District Court is unreported. The decision of the immigration judge (App. 11), and the decision of the Board of Immigration Appeals are both unreported.

JURISDICTION

The order and judgment of the court of appeals was issued on March 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 14-21) are pertinent portions of the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2, the Due Process Clause, and Art. III, § 1 of the Constitution; 28 U.S.C. § 2241, 8

[1] "App." refers to the appendix to this petition.

U.S.C. § 1105a(a) and § 1182(c) (1994), as in effect before and after April 24, 1996; Sections 401(e), 440(a), and 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276, 1277 ("AEDPA"); and Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C. 110 Stat. 3009-625 ("IIRIRA").

STATEMENT OF THE CASE

On November 30, 1998, the Board of Immigration Appeals ("BIA") dismissed petitioner's appeal from the decision of the immigration court. The Board's jurisdiction arose under 8 C.F.R. §§ 3.1(b)(3), 242.21. The petition for habeas corpus was filed before the United States District Court for the Northern District of Illinois. Petitioner asserts that jurisdiction arose under 28 U.S.C. § 2241 and the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2. The district court dismissed this action on July 2, 1999. An appeal was filed to the Court of Appeals for the Seventh Circuit. The Court of Appeals jurisdiction arose under 28 U.S.C. § 1291.

THE STATUTORY FRAMEWORK

I. *Relief from Deportation.* Aliens lawfully admitted for permanent residence who became subject to deportation because of a criminal conviction have long been statutorily authorized to apply for relief from deportation under former 8 U.S.C. § 1182(c) if they met the eligibility criteria. Before 1996, those criteria were that the alien had

a lawful unrelinquished domicile in this country for seven years, and, if his conviction were for an "aggravated felony" (as defined in the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(43) (1994)), that he had not served a term of imprisonment for that conviction for five years or longer. 8 U.S.C. § 1182(c) (1995). The request for Section 1182(c) relief was adjudicated by an immigration judge as a part of the deportation process and an order of deportation was not entered until the Section 1182(c) application was adjudicated. Over half of the total number of applications for Section 1182(c) relief were granted during fiscal years 1989 through 1994. *See, Goncalves v. Reno*, 144 F.3d 110, 128 (1st Cir. 1998), *cert. denied*, ___U.S.___, 119 S.Ct. 1140 (1999).

On April 24, 1996, the President signed AEDPA into law. Section 440(d) provides that any alien who "is deportable by reason of having committed" one of a broad range of enumerated criminal offenses is ineligible for relief under 8 U.S.C. § 1182(c), even if the alien has not served any time in prison. By its express terms, Section 440(d) applies only to deportable and not excludable aliens, and thus would not have applied to petitioner if he had traveled across the border and sought relief in exclusion proceedings when seeking to re-enter the country. Moreover, the provision is silent on whether it applies to immigration cases, such as this case, which were pending on the date of its enactment.

The Attorney General addressed the temporal scope of Section 440(d) when she issued a formal ruling (overruling the Board of Immigration Appeals) holding that AEDPA Section 440(d)'s new eligibility restrictions were applicable to all Section 1182(c) requests, regardless of

when they were submitted or when the immigration proceedings commenced. *Matter of Soriano,* Interim Decision # 3289 (A.G. Feb. 21, 1997) (App. 36-49). The Attorney General noted that Section 440(d) itself did not contain an express statement addressing the provision's temporal reach and concluded, on that basis alone, that Congress had not prescribed the cases to which Section 440(d) applies. The Attorney General's ruling pre-dated this Court's decisions in *Lindh v. Murphy,* 521 U.S. 320 (1997), and *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939 (1997), and did not consider whether congressional intent could be discerned from the statute's structure or its legislative history. Finding no evidence of congressional intent in the text of AEDPA Section 440(d), the Attorney General applied judicial default rules and held that application of the new restrictions to pending cases did not have "retroactive effect" under *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994).

Six courts of appeals have now held that the Attorney General erred in *Matter of Soriano* in holding that AEDPA 440(d) applies to all Section 1182(c) cases pending when AEDPA became law. In each case, the circuits found that the specific language, structure and legislative history of AEDPA Title IV demonstrated congressional intent to apply Section 440(d) prospectively based on the "normal rules" of statutory construction, *Lindh,* 521 U.S., at 326, and that resort to judicial default rules was not warranted. Because these courts found that the statute did not apply retroactively, they had no occasion to address the equal protection challenge to AEDPA Section 440(d)'s differing treatment of deportable and excludable aliens. *See, Goncalves v. INS,* 144 F.3d, at 126-33; *Henderson*

v. INS, 157 F.3d 106, 128-30 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, ___U.S.___, 119 S.Ct. 1141 (1999); *Sandoval v. Reno*, 166 F.3d 225, 242 (3d Cir. 1999); *Pak v. Reno*, 196 F.3d 666, 676 (6th Cir, 1999); *Shah v. Reno*, 184 F.3d 719, 724 (8th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301-04 (11th Cir. 1999).[2] Petitioner challenged the Attorney General's application of the law. He argued before the district court that the interpretation violated the rules of retroactivity and violated his rights to equal protection. Petitioner was left unable to make any arguments based on retroactivity and equal protection. The Seventh Circuit Court of Appeals reversed its prior precedent, dismissed the appeal, and held that the district court did not even have habeas corpus jurisdiction to consider such arguments, based on *LaGuerre v. Reno*, 164 F.3d 1035, 1039-40 (7th Cir. 1998), *cert. denied*, 68 U.S.L.W. 3532 (U.S. Feb. 22, 2000).

II. *Judicial Review.* Before AEDPA and IIRIRA, judicial review of final orders of deportation was governed by 8 U.S.C. § 1105a. Under Section 1105a(a), review of final orders of deportation – regardless of the basis for the order – was had through a petition for review directly

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[2] The Tenth Circuit found habeas jurisdiction to review a statutory retroactivity claim, but it did not address the precise merits question in this case, i.e., whether Section 440(d) applies to immigration proceedings that were pending on AEDPA's effective date. It decided only that Section 440(d) does apply to pre-AEDPA convictions. *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1150 (10th Cir. 1999). The Third Circuit has held that AEDPA Section 440(d) does not apply to proceedings commenced before AEDPA (such as the one in this case). *Sandoval, supra.*

in the courts of appeals. The statute further specified that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." 8 U.S.C. § 1105a(a)(10), but the courts of appeals disagreed about when an alien could invoke such habeas review. *See, e.g. Nakaranurack v. INS*, 68 F.3d 290 (9th Cir. 1995); *Williams v. INS*, 795 F.2d 738 (9th Cir. 1986); *United States ex rel. Marcello v. INS*, 634 F.2d 964 (5th Cir. 1981).

III. *The 1996 Amendments.* AEDPA enacted two changes to 8 U.S.C. § 1105a. First, in Subtitle A of Title IV, AEDPA Section 401(e) repealed the habeas provision in Section 1105a(a)(10). Second, in Subtitle B, AEDPA Section 440(a) amended Section 1105a(a)(10) to provide that no court shall review final orders of deportation entered against immigrants who are deportable based on enumerated criminal grounds.[3] IIRIRA became law four months later and enacted more comprehensive changes to judicial review. First, it enacted special transitional rules amending Section 1105a. The transitional rules govern judicial review of deportation cases, such as those of petitioner herein, where immigration proceedings commenced before April 1, 1997, and the BIA's final order issued after October 30, 1996. *See*, IIRIRA Section 309(a), (c)(1) & (4); *Reno v. American-Arab Anti-Discrimination Committee*,

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[3] Section 440(a) provides: "Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by [enumerated grounds of deportation] shall not be subject to review by any court." AEDPA Section 440(a), 110 Stat. 1276.

___U.S.___, 119 S.Ct. 936 (1999).[4] Section 309(c)(4)(G) of the transitional rules provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections]." IIRIRA Section 309(c)(4)(G), 110 Stat. 3009-626. These uncodified transitional judicial review rules apply notwithstanding any provision of Section 1105a to the contrary. IIRIRA Section 309(c), 110 Stat. 3009-625. Second, IIRIRA repealed Section 1105a altogether and enacted a new permanent judicial review statute for immigration cases initiated on or after April 1, 1997 (now called "removal" proceedings). This provision, codified at 8 U.S.C. § 1252, applies only to "removal" cases, and has no application to this case. *See*, 8 U.S.C. § 1252 (Supp. II 1996).[5] None of the various amendments to the judicial review statutes enacted by AEDPA or IIRIRA expressly amend or address the general grant of habeas corpus jurisdiction to the federal courts under 28 U.S.C. § 2241. AEDPA and IIRIRA's transitional and permanent rules make no mention of Section 2241 at all.

IV. *Application of AEDPA and IIRIRA's Transitional Rules by the Courts of Appeals.* The effect of the new

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[4] For cases with a final BIA order issued before October 31, 1996, transitional rules do not apply and only Section 1105a (as amended by AEDPA) governs judicial review. IIRIRA Section 309(c)(2).

[5] One provision of Section 1252, subsection (g), applies to pre-April 1, 1997 cases. This applies only to a narrow subset of claims that are not raised here, as petitioner seeks review only of a final order of deportation. *American-Arab Anti-Discrimination Committee*, 119 S.Ct., at 943.

statutes on the federal court's jurisdiction to review final deportation orders first arose in the context of petitions for review filed in the courts of appeals. The circuit courts, including the Seventh Circuit, overwhelmingly held that AEDPA Section 440(a) and IIRIRA transitional rule Section 309(c)(4)(G) repealed the circuit court's jurisdiction over petitions for review filed by immigrants deportable on criminal grounds seeking to challenge the denial of relief from deportation. This was done over the objection of immigrants seeking to preserve court of appeals' jurisdiction, over petitions for review. In each of these decisions, however, the circuit courts dismissed the petitions for review without foreclosing, and in many cases expressly assuming, the availability of habeas review.[6] The courts of appeals declined to decide whether habeas corpus was definitively available (or to address the scope of review that habeas might provide) until the alien had filed a district court habeas corpus action. Some immigrants unsuccessfully sought *certiorari* in this Court of those rulings on the ground that the Constitution, including the Suspension Clause, required preservation of judicial review. The Solicitor General opposed *certiorari*

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[6] *See, Turkhan v. INS*, 123 F.3d 487, 489-90 (7th Cir. 1997); *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997). *See also Lerma de Garcia v. INS*, 141 F.3d 215 (5th Cir.), *reh'g en banc denied*, 159 F.3d 1358 (1998); *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1155 (10th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 354 n.1 (11th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790 (1st Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Hincapie-Nieto v. INS*, 92 F.3d 27, 30-31 (2d Cir. 1996), *Duldulao v. INS*, 90 F.3d 400 n.4 (9th Cir. 1996).

on the basis, *inter alia*, that any claim under the Constitution's Suspension Clause must await the filing of a habeas corpus petition.[7] In the face of these uniform circuit court decisions, immigrants such as petitioner herein, filed habeas corpus actions to obtain judicial review of their orders of deportation. Ten courts of appeals have now squarely ruled on the availability of habeas corpus, in cases governed by AEDPA Section 440(a) or IIRIRA Section 309(c)(4)(G), to challenge the constitutionality of AEDPA Section 440(d). The constitutional challenges have involved retroactivity and equal protection claims.

Contrary to the ruling in this case, the other ten circuits have all held that AEDPA and IIRIRA's transitional rules do not repeal the district courts' habeas corpus jurisdiction under 28 U.S.C. § 2241. Eight of the other circuits did not even limit jurisdiction to cases involving constitutional claims. Those courts concluded that the repeal of Section 2241 must be express, that the applicable provisions of AEDPA and IIRIRA do not mention Section 2241, and that preserving the district courts' habeas corpus jurisdiction avoids difficult and complex constitutional questions that would otherwise be raised

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[7] Brief for the Respondent [INS] in Opposition at 23, *Katsoulis v. INS*, No. 97-379 (filed Nov. 1997), *cert. denied*, ___U.S.___, 118 S.Ct. 624 (1997) (opposing *certiorari* and arguing that any claim under the Suspension Clause was not properly presented because petition "did not seek a writ of habeas corpus"); Brief for the [INS] in Opposition at 15, *Chamorro-Torres v. INS*, No. 96-985 (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (1997) (same); Brief for the [INS] in Opposition at 9, *Qasguargis v. INS*, No. 96-806 (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (1997) (same).

by the bar on the court of appeals review of deportation orders. *See, Wright v. Ouellette*, 171 F.3d 8, 10 (1st Cir. 1999); *Henderson v. INS*, 157 F.3d, at 118-22; *Sandoval v. Reno*, 166 F.3d, at 238; *Bowrin v. INS*, 194 F.3d 483, 489-90 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 301 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d, at 673; *Shah v. Reno*, 184 F.3d, at 724; *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 2000); *Jurado-Gutierrez v. INS*, 190 F.3d, at 1140; *Mayers v. Reno*, 175 F.3d, at 1301.[8]

V. *Seventh Circuit Precedent.* The Seventh Circuit has had three sets of conflicting precedent. First, in *Yang v. INS*, 109 F.3d 1185 (7th Cir.), *cert. denied sub nom. Katsoulis v. INS*, ___U.S.___, 118 S.Ct. 624 (1997), the court stated in *dicta* that habeas review would be abolished when IIRIRA took effect, and that insofar as any review was available to challenge the denial of relief from deportation, that review must be sought in the court of appeals by means of a petition for review. Review would be limited to the issues of alienage, deportability, and conviction of a disqualifying offense. *Yang v. INS*, 109 F.3d, at 1192, 1196. Second, contrary to *Yang*, the court held in *Chow v. INS*, 113 F.3d 659 (7th Cir. 1997) and *Turkhan v. INS*, 123 F.3d 487 (7th Cir. 1997), that there was no review available in the court of appeals to challenge denial of relief from deportation, even on constitutional grounds. However, both *Chow* and *Turkhan* expressly stated that

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[8] In *Pak v. Reno*, 196 F.3d at 673, the Sixth Circuit held that the district courts retained habeas jurisdiction under Section 2241, but the decision is limited to cases in which a criminal alien is precluded from seeking an appeal of an executive detention and subsequent deportation order.

habeas corpus review might still be available. Third, in *LaGuerre v. Reno*, 164 F.3d 1035, 1039-40 (7th Cir. 1998), *cert. denied*, 68 U.S.L.W. 3532 (U.S. Feb. 22, 2000), the Seventh Circuit held that habeas corpus review was not available, and that contrary to *Chow*, and *Turkan*, the court of appeals retained jurisdiction via a petition for review, to challenge the deportation on constitutional grounds.

STATEMENT OF FACTS

1. Administrative and District Court Proceedings.

Petitioner is a male, married to a U.S. citizen, with three U.S. citizen children, who resided in the U.S. since 1983, and last entered the country October 15, 1989, as a returning resident alien. On March 14, 1990, petitioner was convicted of conspiracy to distribute a controlled substance, and distribution of a controlled substance. In 1995, the INS issued an Order to Show Cause, commencing deportation proceedings, based on the 1990 convictions. At that time, petitioner requested relief under 8 U.S.C. § 1182(c). On May 8, 1997, the Immigration Court held petitioner was ineligible for relief under Section 1182(c), based on *Matter of Soriano*, Interim Decision # 3289 (A.G. February 21, 1997) (Ruling that AEDPA Section 440(d) applied retroactively, eliminating Section 1182(c) relief to pending cases).

On January 8, 1999, a petition for writ of habeas corpus was filed with the district court. On July 2, 1999, the court held that Section 440 of AEDPA divested it of jurisdiction, based on *LaGuerre v. Reno*. The Seventh

Circuit Court of Appeals summarily affirmed on March 1, 2000, based on *LaGuerre v. Reno*.

2. The Court of Appeals Opinion in *LaGuerre v. Reno*, on the basis of which this matter was summarily dismissed.

The court of appeals in this case applied its decision in *LaGuerre*, a case at odds with the decisions of every other circuit. While this Court denied certiorari last term for *LaGuerre*, petitioner urges that the matter be reconsidered because of a serious split in the circuits. In *LaGuerre*, the Court held that AEDPA Section 440(a) deprived the district courts of habeas corpus jurisdiction under 28 U.S.C. § 2241, but indicated aliens could instead raise certain claims directly to the Court of Appeals by petition for review.

The court did not find that AEDPA had expressly amended or repealed the general federal habeas corpus statute, 28 U.S.C. § 2241, and noted the "omission from section 440(a) of an explicit reference to 28 U.S.C. § 2241." *LaGuerre v. Reno*, 164 F.3d, at 1039 (App. 22-34). The court nonetheless held that access to Section 2241 had been repealed based on its view that the "purpose" of the amendments was inconsistent with the availability of district court habeas corpus review. *LaGuerre*, at 1039. The court did not address whether AEDPA, IIRIRA or the general intent of Congress were sufficient to satisfy the rule of *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), and *Felker v. Turpin*, 518 U.S. 651 (1996), that repeal of Section

2241 must be express and cannot be implied.[9] The court of appeals rejected any concern that the Suspension Clause might entitle petitioner to review of his claim. The *LaGuerre* decision states that the Suspension Clause ensures review only when the "jurisdiction" of the detaining authority was at issue. *LaGuerre*, at 1038. Applying that standard, the court of appeals concluded that the Suspension Clause did not encompass petitioners' claim because it believed there was no question about the "jurisdiction" of the detaining authorities, as petitioners sought to litigate "whether they were entitled to ask for discretionary relief" from deportation. *LaGuerre*, at 1039. The court of appeals did not address petitioners' additional contentions that the right to judicial review over their statutory and constitutional claims was guaranteed by due process, and Article III's separation of powers principle.

The court suggested that the statute did not necessarily extinguish all judicial review and assumed that the court of appeals could hear some constitutional claims in petition for review. *LaGuerre*, at 1040 (citing *Webster v. Doe*, 486 U.S. 592 (1988)) and "maybe" even a statutory retroactivity claim. *LaGuerre*, at 1041.[10] The opinion did

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[9] The court's holding that Section 2241 was repealed was based solely on AEDPA Section 440(a) and does not consider or address the transitional judicial review provision, IIRIRA 309(c)(4)(G), that specifically governs the judicial review of the order in that case, and in this case, which were entered after October 30, 1996.

[10] The opinion suggested that the Third, Tenth and Eleventh Circuits might follow its approach in light of preliminary rulings by those circuits. *LaGuerre*, at 1040. All three

not explain how the plain text of Section 440(a) would be construed to permit review in the court of appeals of non-constitutional claims, and it appears such claims are not subject to review in the Seventh Circuit.

SUMMARY OF THE ARGUMENT

This case concerns amendments to the INA made in 1996 by the AEDPA, and the IIRIRA. The provisions at issue concern: (1) the jurisdiction of the federal courts; and (2) the relief available for longtime legal permanent residents deportable on the basis of their past criminal convictions. More specifically, the jurisdictional issue presented by this petition is whether the court of appeals erred in finding that habeas corpus jurisdiction under 28 U.S.C. § 2241 had been repealed when neither AEDPA nor IIRIRA expressly repeals or even mentions Section 2241, when elimination of habeas relief under Section 2241 raises complex constitutional questions regarding the scope of judicial review guaranteed by the Constitution (including, but not limited to, the Suspension Clause). The issue on the merits is whether a new restriction on statutory eligibility for relief from deportation applies retroactively, and whether the restriction violates equal protection by drawing an irrational distinction between deportable and excludable aliens.

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circuits however, have since ruled that district courts retain jurisdiction under Section 2241 for issues identical to the ones raised herein. *See*, "Judicial Review" pages 5-6.

Every U.S. Circuit Court of Appeals has addressed the identical jurisdictional issue presented here and none has adopted the result or reasoning of the Seventh Circuit. As a result, the federal courts are governed by contradictory jurisdictional rules. The U.S. immigration laws are subject to inconsistent application across the nation.

For the reasons stated below, the Court should grant *certiorari*, vacate the judgment of the court of appeals and remand this matter for reconsideration. Alternatively, the Court should grant plenary review of both the jurisdictional and merits issues.

REASONS FOR GRANTING THE PETITION

The court of appeals ruled that AEDPA repealed all habeas corpus jurisdiction over petitioner's deportation order, based on *LaGuerre*. This result has been rejected by every other court. *See, Wright v. Ouellette*, 171 F.3d, at 10; *Henderson v. INS*, 157 F.3d, at 118-22; *Sandoval v Reno*, 166 F.3d, at 238; *Bowrin v. INS*, 194 F.3d, at 489-90; *Requena-Rodriguez v. Pasquarell*, 190 F.3d, at 301; *Pak v. Reno*, 196 F.3d, at 673; *Shah v. Reno*, 184 F.3d, at 724; *Magana-Pizano v. INS*, 200 F.3d, at 609; *Jurado-Gutierrez v. INS*, 190 F.3d, at 1140; *Mayers v. Reno*, 175 F.3d, at 1301.

In addition, in denying the right to habeas corpus relief, the Seventh Circuit has also rejected statutory challenges to the law, allowing only constitutional challenges. The statutory challenges were successful in many jurisdictions where they were allowed. Because of the limited right to review, in the Seventh, Fifth and Tenth Circuits,

longtime, legal permanent residents are disqualified from Section 1182(c) relief and hence, are subject to automatic deportation. By contrast, in the First, Second, Third, Fourth, Sixth, Eighth, and Eleventh Circuits, such aliens are eligible for relief under Section 1182(c). In this extreme lack of uniformity, in several pockets of the country many more immigrants face automatic deportation. The effect is that, depending on the place of residence, an alien may have either (1) the right to apply for relief from deportation, with a better than 50% chance of relief being granted, or (2) automatic deportation with a lifetime bar to reentering the United States. This inconsistency is unconscionable.

For the reasons discussed below, the conflict between the Seventh and every other circuit with regard to jurisdiction, on a national issue affecting the lives of thousands of longtime lawful residents and their families, warrants this Court's plenary review. The Seventh Circuit's ruling subjects immigrants to divergent jurisdictional rules and inconsistent interpretations of the immigration laws depending on the state in which they reside.

I. The Court Should Grant Plenary Review to Resolve the Circuit Conflict Over the Proper Jurisdiction of the Federal Courts.

1. The Seventh Circuit's ruling is in conflict with the result uniformly adopted by every other jurisdiction, and concerns a nationally applicable question of jurisdiction

affecting the operation of the federal courts and the predictability of rules governing judicial review of final deportation orders.

2. The Seventh Circuit's analysis also raises far-reaching constitutional questions concerning the limits on Congress' power to regulate the jurisdiction of the federal courts. As the other circuits have recognized, if the 1996 amendments are construed to preserve Section 2241 jurisdiction over deportation orders, it is unnecessary to decide whether the scope of review guaranteed directly by the Constitution encompasses statutory claims because Section 2241's plain terms set forth its scope of review. 28 U.S.C. § 2241(c)(3) (violations of the "Constitution or laws or treaties of the United States"). *See, e.g., Shah v. Reno*, 184 F.3d, at 724; *Sandoval v. Reno*, 166 F.3d, at 237; *Goncalves v. INS*, 144 F.3d, at 122; *Jurado-Gutierrez v. INS*, 190 F.3d, at 1140. *See also, Felker*, 518 U.S., at 661-62 (resolution of Article III questions unnecessary because of availability of Section 2241).

The Seventh Circuit suggested its approach might also avoid constitutional adjudication by exempting constitutional claims from the bar on review in the court of appeals, including retroactivity, since it "seem[ed] unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect. *LaGuerre*, at 1041. But besides retroactivity, in the Seventh Circuit, other statutory claims appear to be barred.

3. Finally, the court of appeals' Suspension Clause analysis is incorrect. The court of appeals in *LaGuerre*, and applied herein, stated that the Suspension Clause did

not encompass petitioner's claim and that the scope of review guaranteed by the Suspension Clause does not move in "lockstep" with Congress' statutory enlargements of habeas review. *LaGuerre*, at 1039. But in fact the Suspension Clause historically has covered the types of claims raised herein.

The voluminous and specific body of habeas law in the immigration context shows that the scope of constitutionally mandated habeas review has never been limited in the restrictive manner suggested by the court of appeals. This Court and lower courts have traditionally exercised habeas jurisdiction to ensure that both the initial finding of deportability and the denial of discretionary relief complied with the Constitution, and with the governing immigration statutes. This habeas review occurred even under the 1891 and 1917 Immigration Acts, where the only "judicial intervention" permitted was that "required by the Constitution," and was, by definition, constitutionally mandated. *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953). *See, e.g., United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957); *Mahler v. Eby*, 264 U.S. 32, 44-45 (1924). *See, Henderson*, 157 F.3d, at 120 ("for at least one hundred years the courts have reviewed the executive branch's interpretation of the immigration laws, and have deemed such review to be constitutionally mandated"). *See also Mayers*, 175 F.3d at 1299-1300; *Sandoval*, 166 F.3d, at 237.[11] The Seventh Circuit did not cite

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[11] In *Accardi* the Court reviewed in habeas corpus the "refusal to exercise" discretion, over the dissenter's objection that habeas review did not extend to the denial of discretionary relief. *See, Accardi*, 347 U.S., at 269 (Jackson, J. dissenting).

any immigration habeas decisions, or even any decision involving executive detention, but nonetheless holds, based on *LaGuerre*, that petitioner's claims were not encompassed within the scope of review over deportation orders guaranteed by the Suspension Clause. The potentially far-reaching implications of the court's constitutional analysis and the divergence of its holding from the holding of the other circuits warrants plenary review.

CONCLUSION

Petitioner respectfully submits that the petition for writ of certiorari should be granted, and the case accepted for plenary review.

Respectfully submitted,

STEPHEN BERMAN
Counsel of Record
20 North Clark, Suite 725
Chicago, Illinois 60602
(312) 372-1199

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

March 1, 2000

Before

Hon. Richard A. Posner, *Chief Judge*
Hon. John L. Coffey, *Circuit Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*

SAMUEL LECHUGA, Petitioner-Appellant,	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 99-2930 v.	]	
BRIAN PERRYMANN, Respondent-Appellee.	]	No. 99 C 85
	]	Elaine E. Bucklo, Judge.

ORDER

On consideration of the "PETITIONER-APPELLANT'S MEMORANDUM WHY APPEAL SHOULD NOT BE SUMMARILY AFFIRMED" filed on August 20, 1999, and the "GOVERNMENT'S RESPONSE TO PETITIONER-APPELLANT'S JURISDICTIONAL MEMORANDUM" filed on September 3, 1999, and review of the short record,

IT IS ORDERED that this appeal is SUMMARILY AFFIRMED.

The district court dismissed appellant's § 2241 *habeas corpus* petition for lack of subject matter jurisdiction, citing our decision in *LaGuerre v. Reno*, 164 F.3d 1035 (7th

Cir. 1998), *cert. denied*, 68 U.S.L.W. 3532 (U.S. Feb. 22, 2000) (No. 99-418), Appellant filed a timely appeal.

In *LaGuerre* we held that judicial review of deportation orders by way of *habeas corpus* was largely eliminated for criminal aliens. Nevertheless, *LaGuerre* recognized a safety valve whereby such deportees can seek direct review of substantial constitutional claims in the court of appeals. The *LaGuerre* court further noted that in rare cases, "if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in this court by seeking review here directly under Section 440(a), he may be able to proceed in the district court under 28 U.S.C. § 2241." 164 F.3d at 1040. However, like the petitioners in *LaGuerre*, the appellant here does not present one of those extremely rare cases. *See Musto v. Perryman*, 193 F.3d 888 (7th Cir. 1999).

Appellant makes no suggestion that he was "mousetrapped" into conceding deportability in reliance on having a good shot at a waiver of deportability. Further, appellant's papers present no "substantial constitutional issue" or "bizarre miscarriage of justice", permitting review in this court. We add that while pre-*LaGuerre* case law may have directed some individuals contesting deportation orders to the district court, the appellant here brought his *habeas* action 2½ weeks after the court's decision in *LaGuerre*. Accordingly, the district court properly dismissed appellant's petition, *see Bhatt v. Reno*, No. 99-1232, slip op. (7th Cir. Oct. 19, 1999) (published Jan. 31, 2000); *Musto v. Perryman*, 193 F.3d 888 (7th Cir. 1999), and its judgment is

AFFIRMED.

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Elaine E. Bucklo

Sitting Judge if Other than Assigned Judge

CASE NUMBER 99 C 85 **DATE** 7/2/1999

CASE TITLE Lechuga vs. Perryman

[In the following box [❐] indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ❐ Filed motion of [use listing in "Motion" box above.]

(2) ❐ Brief in support of motion due _____.

(3) ❐ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ❐ Ruling/Hearing on _____ set for _____ at _____.

(5) ❐ Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ❐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ❐ Trial[set for/re-set for] on _____ at _____.

(8) ❐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ❐ This case is dismissed [with/without] prejudice and without costs [by/agreement/pursuant to]

❒ FRCP4(m) ❒ General Rule 21
❒ FRCP41(a)(1) ❒ FRCP41(a)(2).

(10) ■ [Other docket entry] Government's motion to dismiss (4-1) is granted and Mr. Lechuga's petition for a writ of habeas corpus is dismissed for lack of subject matter jurisdiction. Ruling set for 7/2/99 is vacated. Any pending motion in this case is terminated as moot.

(11) ■ [For further detail see order on the reverse side of the original minute order.]

No notices required, advised in open court.

No notices required.

Notices mailed by judge's staff.

Notified counsel by telephone.

✓ Docketing to mail notices.

✓ Mail AO 450 form.

Copy to judge/magistrate judge.

MPJ courtroom deputy's initials

number of notices
date docketed
docketing deputy initials
date mailed notice
mailing deputy initials

Date/time received in central Clerk's Office

Samuel Lechuga brought this action pursuant to 28 U.S.C. § 2241 for a writ of habeas corpus to prevent his imminent deportation from the United States. After Mr. Lechuga, a resident alien, was convicted on drug charges, the Immigration and Naturalization Service ("INS") placed him in deportation proceedings. Mr. Lechuga

applied for relief from deportation under § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (since repealed and replaced by § 240A(b), codified at 8 U.S.C. § 1229b(b)), but the Immigration Court and the Board of Immigration Appeals found that because of his drug conviction he was not entitled to relief pursuant to § 440 of the Antiterrorism and Effective Dealth [sic] Penalty Act ["AEDPA"]. Subsequently Mr. Lechuga filed a petition for habeas corpus, arguing that retroactive application of § 440 of the AEDPA violates due process, and that application of § 440 to aliens in deportation proceedings but not in exclusion proceedings violates equal protection. The government moves to dismiss for lack of subject matter jurisdiction pursuant to *LaGuerre v. Reno*, 164 F.3d 1035 (7th Cir. 1998).

In *LaGuerre*, the Seventh Circuit held that § 440 divests district courts of jurisdiction to review habeas corpus petitions in cases where aliens convicted of certain drug offenses seek review of a § 212(c) waiver denial. *LaGuerre*, 164 F.3d at 1037-40.[1] Aliens challenging their deportation on constitutional grounds may instead raise

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[1] Section 404(a) of the AEDPA states: "Any final order of deportation against an alien who is deportable by reason of having committed [certain criminal offenses] shall not be subject to review by any court." This section was codified at 8 U.S.C. § 1105a, which was repealed by § 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 with respect to deportation proceedings initiated on or after April 1, 1997. Mr. Lechuga's deportation proceedings were initiated in 1995. In *LaGuerre*, the court held "that for the class of aliens encompassed by section 440(a), judicial review by means of habeas corpus did not survive the enactment of that section." *LaGuerre*, 164 F.3d at 1040.

those issues directly in the appellate court. *Id.* at 1040. Mr. Lechuga argues that he is nonetheless entitled to relief because he is not challenging a discretionary decision by the INS to "commence proceedings, adjudicate cases, or execute removal orders," as is prohibited by 8 U.S.C. § 1252(g). In support of his argument Mr. Lechuga relies on *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). In *Parra*, the Seventh Circuit held that the district court had subject mater jurisdiction to hear the petitioner's habeas petition because the petitioner did "not even hint at a substantive argument that he is entitled to remain in the United States. The question . . . is where he passes the time while waiting for the order to become final." *Id.* at 956. The petitioner argued only that he should be released on bail while the administrative proceeding was ongoing. *Id.* at 956-57. The court distinguished *LaGuerre*, where the petitioners "tried to use § 2241 to obtain anticipatory review of both the administrative adjudication and the removal order. . . . " *Id.* at 957.

Despite Mr. Lechuga's argument to the contrary, his petition requests a writ of habeas corpus "to prevent [his] imminent deportation from the United States' and to "direct[] Respondent not to apprehend and deport" him. (Pet. at 1, 5). Mr. Lechuga is obviously requesting review of the discretionary decision to execute a removal order, and such review is prohibited by 8 U.S.C. § 1252(g). Mr. Lechuga's attempt to distinguish his case based on the argument that he is seeking collateral rather than direct review also fails, for the petitioners in *LaGuerre* were also seeking habeas review, and one of the petitioners brought the same equal protection challenge advanced by Mr. Lechuga. *LaGuerre*, 164 F.3d at 1037. *See also Singh v. Reno*,

___ F.3d. ___, 1999 WL 335675 (7th Cir. 1999) (finding that the district court lacked subject matter jurisdiction over habeas petition where petitioner brought constitutional claims challenging his administrative adjudication and removal order). Therefore Mr. Lechuga's petition is dismissed for lack of subject matter jurisdiction.

ENTER ORDER:

Dated: July 2, 1999

United States District Court
Northern District of Illinois
Eastern Division

Samuel Lechuga

v.

Brian Perryman

JUDGMENT IN A CIVIL CASE

Case Number: 99 C 85

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

[X] Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that government's motion to dismiss is granted and accordingly, the petitioner's petition for a writ of habeas corpus is dismissed for lack of subject matter jurisdiction.

Michael W. Dobbins,
Clerk of Court
/s/ Mathew P. John
Mathew P. John,
Deputy Clerk

Date: 7/2/1999

(LOGO)

U.S. Department of Justice

Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Clerk

P.O. Box 8530
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Kriezelman, Jeffrey A.
20 North Clark Street,
Suite 725,
Chicago, IL 60602-0000

Office of the District Counsel/CH
P.O. Box A-3423
Chicago, IL 60690

November 30, 1998

LECHUGA-QUINONES, SAMUEL
A#: 21-653-331

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

/s/ Paul W. Schmidt
Paul W. Schmidt
Chairman

Enclosure

Panel Members:

HURWITZ, GERALD S.
MORSE, MARVIN H.
SCIALABBA, LORI L.

U.S. Department of Justice

Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the board of
Immigration Appeals

File: A21 653 331 – Chicago

Date:
NOV 30 1998

In re: SAMUEL
LECHUGA-QUINONES

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jeffrey A. Kriezelman, Esquire
20 North Clark Street,
Suite 725
Chicago, Illinois 60602

ON BEHALF OF SERVICE: Lynn K. Hollander
Assistant District
Counsel

ORDER:

PER CURIAM. The respondent is seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, the respondent is statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)" *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132,

110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997).

The respondent is also seeking relief from deportation under section 212(h) of the Act. However, due to the respondent's conviction of an aggravated felony, the respondent is also ineligible for that form of relief. *Matter of Yeung*, Interim Decision 3297 (BIA 1996).

The respondent has argued on appeal that AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. We cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

Accordingly, the respondent's appeal is dismissed. The request for oral argument before the Board is denied.

/s/ Gerald S. Hurwitz
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File No.: A21 653 331 May 8, 1997

In the Matter of	)	
SAMUEL	)	IN DEPORTATION
LECHUGA-QUINONES	)	PROCEEDINGS
Respondent	)	
	)	

CHARGE: Section 241(a) (2) (B) (ii) – conviction of a controlled substance offense; Section 241(a) (2) (A) (iii) – conviction of an aggravated felony.

APPLICATIONS:

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Jeffrey Kriezelman, Esq.	Christine M. Young, Esq.
20 North Clark Street	Assistant District Counsel
Chicago, Illinois 60602	Chicago, Illinois

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Mexico who was admitted to the United States on October 15, 1989 as a returning resident alien. However, deportation proceedings were instituted when he was served with an Order to Show Cause charging him with deportability under the above-captioned sections of the Immigration and Nationality Act as a result of his conviction in the United States District Court, Chicago, Illinois on March 14, 1990 for the offenses of conspiracy to distribute a

controlled substance and distribution of a controlled substance. *See* Exhibit 2.

At his deportation hearing, the respondent has admitted the truthfulness of the factual allegations contained in the Order to Show Cause. Based upon these admissions as well as the evidence of record, I therefore find that evidence of his deportability is clear, convincing and unequivocal. Mexico has been designated as the country to which deportation should be directed pursuant to Section 243(a).

Although the respondent is a lawful permanent resident of more than seven years, he does not appear eligible for any form of relief from deportation as a result of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996). Under Section 440(d) of AEDPA, an alien who had committed any crime covered in Sections 241(a) (2) (A) (iii), (B), (C), or (D), or any offense covered by Section 241(a) (2) (A) (ii) or which both predicate offenses are covered by Section 241(a) (2) (A) (i) is ineligible for a 212(c) waiver. The Attorney General has recently decided that this amendment applies to all applicants for 212(c) relief, including those with applications pending on April 24, 1996, the date on which AEDPA was enacted. In re: *Soriano*, Int. Dec. 3289 (A.G. February 21, 1997).

Therefore, inasmuch as the respondent does not appear eligible for any other form of relief, the following order will be entered:

ORDER

IT IS ORDERED that the respondent be deported from the Untied States to Mexico on the charges contained in the Order to Show Cause.

JAMES R. FUJIMOTO,
Immigration Judge
May 8, 1997

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. The Due Process Clause of the United States Constitution, Amend. V, provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

3. Article III of the United States Constitution, Art. III, § 1, provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

4. Prior to April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1995), provided in pertinent part:

> **Exclusiveness of Procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, United States Code, shall apply to, and shall be the sole and exclusive procedure for, the judicial review

of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this title or pursuant to section 242A of this title or comparable provisions of any prior Act, except that –

* * *

(10) Habeas Corpus

Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

5. Effective April 24, 1996, Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provided in pertinent part:

Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that –

* * *

(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by

section [1251](a)(2)(A)(i), shall not be subject to review by any court.

6. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1995), provided:

Nonapplicability of Subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

7. Effective April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of

> subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

8. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS. – Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended –
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

9. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996), provides in pertinent part:

CRIMINAL ALIEN REMOVAL.

(a) JUDICIAL REVIEW. – Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

> "(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * *

(d) CLASSES OF EXCLUDABLE ALIENS. – Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended –

> (1) by striking "The first sentence of this" and inserting "This"; and
>
> (2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

10. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as

amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL. – Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5), this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS. –

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY. – Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective Date –

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW. – In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary –

* * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

11. Section 2241 of Title 28, United States Code, provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

In the

United States Court of Appeals

for the Seventh Circuit

No. 98-1954

GARY LAGUERRE,

Petitioner-Appellant,

v.

JANET RENO, *et al.*,

Respondents-Appellees.

No. 98-2613

JOSÉ MARTIN AVELAR-CRUZ,

Petitioner-Appellee,

v.

JANET RENO, *et al.*,

Respondents-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 97 C 8225 and 98 C 1193 –
Suzanne B. Conlon, *Judge.*

ARGUED OCTOBER 29, 1998 – DECIDED DECEMBER 22, 1998

Before POSNER, *Chief Judge,* and HARLINGTON WOOD, JR., and MANION, *Circuit Judges.*

POSNER, *Chief Judge.* We have consolidated for argument and decision two immigration cases that present

overlapping issues. In one, Gary LaGuerre sought habeas corpus in federal district court under 28 U.S.C. § 2241, challenging the refusal of the Board of Immigration Appeals to consider his application for a waiver of deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994 ed.). Section 212(c) (since repealed and replaced by a new, but basically similar, section, § 240A(b), 8 U.S.C. § 1229b(b)) grants the Attorney General (or the Attorney General's delegates, such as the Board of Immigration Appeals) discretion to waive deportation because of extraordinary hardship to the deportee or his family, or other exceptional circumstances. *Lovell v. INS*, 52 F.3d 458, 461 (2d Cir. 1995). LaGuerre had been ordered deported because he had been convicted of certain drug-related offenses, and section 440(d) of the Antiterrorism and Effective Death Penalty Act, enacted in 1996, amended section 212(c) of the Immigration and Nationality Act to bar waivers of deportation for aliens ordered deported on the basis of such convictions. The Act was passed while the deportation proceedings against LaGuerre were pending; nevertheless the Board of Immigration Appeals held that section 440(d) applied to him. The district court agreed, and LaGuerre appeals.

The other case differs primarily in that the alien, José Martin Avelar-Cruz, prevailed in the district court by convincing the judge that section 440(d) denies equal protection of the laws because it bars waiver only for aliens deportable on the basis of particular offenses and not for aliens excludable from the United States on the basis of the same offenses. If, before deportation proceedings had been instituted against Avelar-Cruz, he had left

the United States and then tried to reenter, and exclusion proceedings had been instituted against him, he could, if ordered excluded, have applied for a waiver of exclusion. The Department of Justice has appealed from the judgment in Avelar-Cruz's case.

The issues common to both cases are whether the district court had jurisdiction and if so whether section 440(d) applies to proceedings that were pending when it was enacted. A third issue, presented only in Avelar-Cruz's case, is whether if there is jurisdiction and section 440(d) is applicable to this case, the section is unconstitutional.

Until 1961, the mode of judicial review of deportation orders was by habeas corpus, or, after 1952, by declaratory judgment actions, in federal district courts. *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Heikkila v. Barber*, 345 U.S. 229 (1953). In 1961 Congress made review of such orders by the courts of appeals, without preliminary recourse to the district courts, the exclusive method of judicial review. Immigration and Nationality Act, § 106, 8 U.S.C. § 1105a (1994 ed.). The purpose of consolidating review in the courts of appeals and thus cutting out the district courts was to thwart the dilatory tactics frequently employed by the lawyers for deportable aliens. *Foti v. INS*, 375 U.S. 217, 225-26 (1963). The right of habeas corpus was preserved, however, in section 106(a)(9) of the Act, 8 U.S.C. § 1105a(a)(9) (1970 ed.) (later renumbered (10)); *Foti v. INS, supra*, 375 U.S. at 231 n. 19, and courts have struggled to reconcile this provision, which permits the alien to proceed in district court, see 28 U.S.C. § 2241(a), with the overall statutory purpose. E.g., *Galaviz-Medina v.*

Wooten, 27 F.3d 487, 489-92 (10th Cir. 1994); *Williams v. INS*, 795 F.2d 738, 743-45 (9th Cir. 1986). The best view is that the provision was intended to be limited to situations in which the alien was unable to obtain judicial review under the new statutory procedure, and should be interpreted accordingly. E.g., *Bothyo v. Moyer*, 772 F.2d 353, 355-56 and n. 1 (7th Cir. 1985); see *Kwok v. INS*, 392 U.S. 206 (1968); *Singh v. Waters*, 87 F.3d 346, 349 (9th Cir. 1996).

Thirty-five years later, section 440(a) of the Antiterrorism and Effective Death Penalty Act amended section 106 to provide that a "final order of deportation against an alien who is deportable by reason of having committed a [drug] offense . . . shall not be subject to review by any court." And section 401(e) also repeals section 106(a)(10) of the 1961 Act, the provision preserving a limited right to apply for habeas corpus. Nevertheless, several decisions in other circuits, as well as dicta in our decisions in *Chow v. INS*, 113 F.3d 659, 668-69 (7th Cir. 1997), and *Turkhan v. INS*, 123 F.3d 487, 490 (7th Cir. 1997), hold that the closing of the door to judicial review in section 440(a) does not apply to habeas corpus. *Henderson v. INS*, 157 F.3d 106, 122 (2d Cir. 1998); *Goncalves v. Reno*, 144 F.3d 110, 118-23 (1st Cir. 1998); *Magana-Pizano v. INS*, 152 F.3d 1213, amended, 159 F.3d 1217 (9th Cir. 1998) (per curiam). These courts point out that Congress did not amend the basic federal habeas corpus statute, 28 U.S.C. § 2241, which is broadly enough worded to encompass persons detained under an order of deportation while awaiting the execution of the order; and they worry that if section 440(a) did close the door to habeas corpus it might violate the provision of the Constitution that forbids suspending habeas corpus other than in times of war

or rebellion. U.S. Const. art. I, § 9, cl. 2. The Eleventh Circuit, however, has taken the opposite position, holding that section 440(a) does abrogate habeas corpus for aliens subject to it. *Richardson v. Reno*, No. 98-4230, 1998 WL 850045 (11th Cir. Dec. 9, 1998).

We doubt that the suspension clause requires preserving habeas corpus as a vehicle for challenging final orders of deportation in cases in which the jurisdiction of the immigration authorities over the alien is not in question. At the time the Constitution was enacted, habeas corpus was an extremely limited remedy. It lay only to test the jurisdiction of whatever governmental body or officer was detaining the applicant. E.g., *Felker v. Turpin*, 518 U.S. 651, 663 (1996); Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 465-74 (1963). Over the years, Congress has authorized a much broader use of habeas corpus; but it cannot be that curtailing an *optional* statutory enlargement violates the suspension clause. That would create an irrational ratchet. Habeas corpus could always be enlarged, but once enlarged could not be returned to its previous, less generous scope without a constitutional amendment. Once this was understood, there would be few if any further enlargements. There can be no doubt that the applicants for habeas corpus in the present cases are detained pursuant to valid orders issued by the responsible authorities. The issue they wish to press – the issue of whether they are entitled to ask for discretionary relief from these orders – does not raise doubts about the jurisdiction of the Immigration and Naturalization Service over them.

We are suggesting not that the meaning of habeas corpus in the suspension clause was set in stone in 1787, an issue left open in *Felker v. Turpin, supra*, 518 U.S. at 664, but only that the meaning of the *constitutional* term does not move in lockstep with changes in the meaning of the *statutory* term. *Lindh v. Murphy*, 96 F.3d 856, 867-68 (7th Cir. 1996) (en banc), rev'd on other grounds, 117 S. Ct. 2059 (1997); see also *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir. 1997). The Sixth Amendment guarantees the right to counsel; but if Congress passed a statute entitling every federal criminal defendant to have three lawyers, it would not mean that the Sixth Amendment entitled every federal criminal defendant to three lawyers.

These considerations make us doubt that concerns about the suspension clause played any role in the omission from section 440(a) of an explicit reference to 28 U.S.C. § 2241. On the contrary, we cannot think of any theory under which Congress would have wanted section 440(a) to limit only review in the courts of appeals and leave intact whatever powers the old section 106(a)(10) – which, remember, section 440(a) repealed – had conferred on the district courts. The purpose of the new section was not to restore the pre-1961 regime and slow down deportation by creating two layers of judicial review, rather than one as under the regime that prevailed for all deportees between 1961 and 1996. The purpose was to curtail and speed up judicial review of deportation orders directed against disfavored classes of criminals, such as drug offenders. If the effect of the new provision was, as our petitioners and the cases we have cited believe, to shift judicial review to the district court, followed of course by appeal to this court, then Congress enlarged

judicial review for these deportees (and for no others! – the others remain under the 1961 procedure, which confines them to the courts of appeals except where direct review by those courts is unavailable) by allowing them to challenge their deportation in two courts rather than one.

Against this the petitioners argue that judicial review by means of habeas corpus is narrower than the direct review in this court under the 1961-1996 regime, being limited to questions of law, so that, provided there is at least *some* evidence to support the order, the court will not disturb it. Under the former regime, the court (just the court of appeals, remember) reviewed for substantial evidence as well. *Dashto v. INS*, 59 F.3d 697, 703 (7th Cir. 1995) [sic] *Paredes-Urrestarazu v. U.S. INS*, 36 F.3d 801, 821 (9th Cir. 1994); *Gouveia v. INS*, 980 F.2d 814, 818 (1st Cir. 1992). This distinction was pointed out by the Supreme Court in *Heikkila v. Barber, supra*, 345 U.S. at 235-36, and has been repeated in subsequent cases. E.g., *Goncalves v. Reno, supra*, 144 F.3d at 124-25. But *Heikkila* was decided in 1953, at a time when habeas corpus was conceived much more narrowly than later on, leaving one to wonder just how much practical difference there would be between the two modes of review today. Habeas corpus is available under 28 U.S.C. § 2241 for anyone held in custody in violation of federal law, including section 212(c) of the Immigration and Nationality Act and its successor provision, and the alien who claims that the Board of Immigration Appeals abused its discretion in failing to grant him relief under that section might be thought to be arguing that the BIA had violated the section. Cf. *Goncalves v. Reno, supra*, 144 F.3d at 125 n. 17.

(Various statutes culminating in the Antiterrorism and Effective Death Penalty Act have curtailed the habeas corpus remedy for persons detained pursuant to a conviction, but an order of deportation is not a conviction.) If so, then Congress accomplished nothing toward its aim of curtailing judicial review if review on habeas corpus survived the door-closing impact of section 440(a). Maybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed by* review by the courts of appeals. If not – if judicial review would be significantly narrower under habeas corpus than under section 106 – we have the anomaly of two tiers of identical review, since in cases when all the district court considers is a question of law, our review is plenary.

We conclude that for the class of aliens encompassed by section 440(a), judicial review by means of habeas corpus did not survive the enactment of that section. It does not follow that judicial review of the class of deportation orders illustrated by the orders in these two cases has been totally extinguished. The government does not argue that. Mindful of the presumption that executive resolutions of constitutional issues are judicially reviewable, *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435 (7th Cir. 1996) (en banc); *Marozsan v. United States*, 852 F.2d 1469 (7th Cir. 1988) (en banc), it urges us to read into section 440(a) an exception that will allow the review of such issues. This is the road we started down in *Yang v. INS*, *supra*, 109 F.3d at 1192, is the approach of the Third Circuit, *Morel v. INS*, 144 F.3d 248 (3d Cir. 1998), and now of the Eleventh, *Richardson v.*

Reno, supra, 1998 WL 850045 at *28-29, has been acknowledged as a possible approach by the Tenth, *Fernandez v. INS,* 113 F.3d 1151, 1155 (10th Cir. 1997), and was favored by the Second Circuit in *Henderson v. INS, supra,* 157 F.3d at 119 n. 9, although that court felt constrained by Second Circuit precedent to eschew the approach in favor of preserving habeas corpus. If, as we believe in agreement with the government, the deportee can seek review of constitutional issues in the court of appeals directly, as under the prior regime governing judicial review of deportation, then the layering of judicial review proposed by the petitioners is avoided, judicial review is curtailed as Congress intended, but enough of a safety valve is left to enable judicial correction of bizarre miscarriages of justice. These are unlikely but, given the unpopularity of aliens in some quarters (which has led the Supreme Court to classify them as a particularly vulnerable group for purposes of judicial review of their equal protection claims, *Bernal v. Fainter,* 467 U.S. 216, 219 (1984)), not unthinkable. Suppose the Board of Immigration Appeals ordered an alien deported on the basis of a criminal conviction that it knew had been vacated, but it didn't care because the alien was black. We have expressed doubt that Congress intended to forbid such orders to be challenged in court under section 440(a). *Yang v. INS, supra,* 109 F.3d at 1192.

Morel and *Richardson,* in holding as do we today that direct review remains available under section 440(a) for aliens wishing to challenge their deportation on constitutional grounds, necessarily imply (and *Richardson* makes explicit) the rejection of habeas corpus in all cases in which direct review is possible, as there is no question of

Congress's power to prescribe a habeas corpus substitute. *Swain v. Pressley*, 430 U.S. 372, 381 (1976); *United States v. Hayman*, 342 U.S. 205 (1952); *Blair-Bey v. Quick*, 151 F.3d 1036, 1042-43 (D.C. Cir. 1998); cf. *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998); *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997). By the same token, if for reasons beyond the alien's control he could not have raised his substantial constitutional issue in this court by seeking review here directly under section 440(a), he may be able to proceed in the district court under 28 U.S.C. § 2241. This we need not decide; such cases will be very rare, and these two cases are not among them. These petitioners brought their actions in the wrong court under the wrong statute. And it is now too late for them to file a petition for review in the right court, 8 U.S.C. § 1105a(a)(1) (1994); *Stone v. INS*, 514 U.S. 386, 406 (1995); *Torres v. INS*, 144 F.3d 472, 473 (7th Cir. 1998); *Hadera v. INS*, 136 F.3d 1338, 1341 (D.C. Cir. 1998), that is, in this court. But we shall add, lest they feel that we've tripped them up on a technicality, that they would not have prevailed even if they hadn t dropped the jurisdictional ball. The Board of Immigration Appeals was right that the abolition of waiver of deportation for the class of deportees that includes these two petitioners applies to pending cases, and so to the petitioners.

Several sections of the Antiterrorism and Effective Death Penalty Act that curtail the rights of aliens are expressly prospective, §§ 440(f), 421(b), 435(b), and two are expressly retroactive, §§ 401(f), 413(g), but section 440(d) is neither. This makes it impossible for us to determine as a matter of legislative intent whether that section is to be applied prospectively or retroactively, *Chow v.*

INS, supra, 113 F.3d at 665, and so we need a rule that determines decision when legislative meaning is opaque. The relevant rule is that statutes which change primary (out of court) duties, for example statutes that impose new tort liabilities, are applied prospectively, while statutes that change merely procedures are applied retroactively. *Lindh v. Murphy,* 117 S.Ct. 2059, 2062-63 (1997); *Landgraf v. USI Film Products,* 511 U.S. 244 (1994); *Chow v. INS, supra,* 113 F.3d at 665; *Reyes-Hernandez v. INS,* 89 F.3d 490, 492 (7th Cir. 1996); *United States v. Certain Funds,* 96 F.3d 20, 24 (2d Cir. 1996). The reasoning behind this distinction is that people are much more likely to rely on substantive than procedural law. But this implies that when it is the kind of procedural change that does disturb reasonable expectations, the presumption in favor of retroactive application is reversed. Suppose a person facing deportation conceded deportability in reliance on having a good shot at a waiver of deportability. In that event, to abolish such waiver for his class of deportees after he had relied by forgoing a challenge to deportability would pull the rug out from under him. And in that case we have held that the abolition would not apply to him, would be prospective only. *Reyes-Hernandez v. INS, supra,* 89 F.3d at 492-93; see also *Yang v. INS, supra,* 109 F.3d at 1191-92; *Arevalo-Lopez v. INS,* 104 F.3d 100 (7th Cir. 1997); *In re Soriano,* Interim Decision No. 3289, p. 8, 1996 WL 426888 (BIA Feb. 21, 1997); but see *Kolster v. INS,* 101 F.3d 785, 789 (1st Cir. 1996); *Hincapie-Nieto v. INS,* 92 F.3d 27, 30 (2d Cir. 1996). There is no suggestion of such "mouse trapping" here. It would border on the absurd to argue that these aliens might have decided not to commit

drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

We may seem to have assumed that if the petitioners had filed a timely petition for review in this court, we could have decided the issue. The government argues that we could not have, since the issue is not constitutional. This would make the decision of the Board of Immigration Appeals regarding the domain of section 440(d) judicially unreviewable. It seems unlikely that Congress would have wanted the Board to have the final word on so pure and fundamental a question of law as when the statute went into effect. So maybe the door to judicial review has been left a little more ajar than we have suggested. *Yang v. INS, supra,* 109 F.3d at 1195-96; *Richardson v. Reno, supra,* 1998 WL 850045 at *28-29. But that is another question that we need not answer today.

We add, finally, that there is no merit to Avelar-Cruz's equal protection challenge. A rational and indeed sensible reason can readily be assigned to Congress's more lenient treatment of excludable as distinct from deportable aliens: it creates an incentive for deportable aliens to leave the country – which is after all the goal of deportation – without their having to be ordered to leave at the government's expense. To induce their voluntary departure, a little carrot is dangled before them, consisting of the opportunity to seek a waiver should they seek to return to the country and by doing so trigger exclusion proceedings.

This equal protection issue must not be confused with that in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), where the government was taking the irrational position that an alien who after coming to the United States had taken a trip abroad and returned and was then ordered deported was entitled to more consideration than one who had never taken a foreign trip after coming to the United States. That is different from the situation of an alien who seeks discretionary relief while he is still outside the United States.

The essential point, however, is that the petitioners initiated their actions in the wrong court. The judgment in LaGuerre's case is modified to base dismissal on want of jurisdiction, and the judgment in Avelar-Cruz's case is reversed with instructions to dismiss the action, also for want of jurisdiction.

Matter of Soriano, Interim Decision # 3289 (A.G. February 21, 1997)

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Section 21z(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *De Osorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. See Matter of Soriano, File No. A39 186 067 (Executive Office for Immigration Review ("EOIR"), Office of the Immigration Judge, Oct. 12, 1995), Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[1] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[2]

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[1] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in (INA) section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." 110 Stat. at 1277, as amended by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. Vol. 9B (110 Stat.) 1672. Respondent's offense is covered by sections 241(a)(2)(A)(iii) and (B) of the INA. See 8 U.S.C. § 1251.

[2] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). Moreover, it is well settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. *Lehman v. Carson*, 353 U.S. 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S, 692, 694 (1957).

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applications pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[3] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d) applies to proceedings such as Respondent's, in which an application for relief under section 212(c) was pending when AEDPA was signed into law.[4]

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[3] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration.

[4] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in *Matter of Bartolome Jhonny Soriano* (A39 186-067).

Analysis

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in (the Court's) decisions concerning the effect of intervening changes in the law": that " "a court is to apply the law in effect at the time it renders its decision," " and that " "(r)etroactivity is not favored in the law." " *Id.* at 263-64 (citations omitted).

The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), species either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive

effect if applied in pending deportation proceedings. In this regard, the Court observed that "(w)hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted). Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates in futuro," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273-74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment), emphasized that intervening law was typically applied to pending applications for prospective relief.

Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "(o)bviously, this form of relief operated only in futuro." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered. *Id.* at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes – those that confer or eliminate jurisdiction – that do not operate retroactively merely because they are applied to conduct arising before the statute's enactment. Justice Scalia explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be

exercised." *Landgraf*, 511 U.S. 286, 292-93 (Scalia, J. concurring).[5]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of Respondent's conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § 404(d) is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute

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[5] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation . . . that does not proscribe any conduct that was previously legal." *Id.* at 296-97 (Blackmun, J., dissenting) (citing *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") and *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[6]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not, as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain."); *De Osorio v. INS*, 10 F.3d at 1042 (holding that an amendment barring applications

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[6] One formulation articulated in Landgraf for determining whether a statute operates retroactively – "whether (it) attaches new legal consequences to events completed before its enactment" – could he interpreted as compelling the conclusion that AEDPA § 404(d) should not be applied to pending applications for section 212(c) relief. *Id.* at 269-70. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event. Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf*. If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events – statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief – would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application.

for waivers of deportations filed after the effective date of the amendment to 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States to the Supreme Court in *INS v. Elramly*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 1260 *and vacated*, 117 S.Ct. 31 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "(j)ust as new "jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties," " *Landgraf*, 511 U.S. at 274, section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to such relief." Supplemental Brief for the Petitioner at 18. The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case," " *Id.* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be

relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[7]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public

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[7] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar. "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power – so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring).

> agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability. Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence. *Id.* at 492-93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded

before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[8]

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability). Second, an alien need not choose between contesting deportability and

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[8] The Seventh Circuit has confirmed that Reyes-Hernandez applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability. *Arevalo-Lopez v. INS*, No. 96-1754, 1997 WL 1898, at *2 (7th Cir., Jan. 3, 1997). Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 270.

seeking section 212(c) relief, an alien may pursue both. It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts.

Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation (is) . . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion' and is similar to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.' " *INS v. Yueh-Shaio Yang*, 117 S.Ct. 350, 352-53 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to 440(d) to section 212(c) applications pending before the EOIR would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

Conclusion

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

Date:_____

Janet Reno Attorney General